

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN McMILLION,	§
	§ No. 446, 2010
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 9312012871
	§
Plaintiff Below-	§
Appellee.	§

Submitted: September 24, 2010

Decided: November 3, 2010

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 3rd day of November 2010, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a) it appears to the Court that:

(1) The defendant-appellant, Marvin McMillion, filed an appeal from the Superior Court's June 18, 2010 order denying his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) The record reflects that, in 1994, McMillion was found guilty of Attempted Unlawful Sexual Intercourse in the First Degree, Robbery in the First Degree, Burglary in the First Degree, Unlawful Sexual Penetration and Criminal Mischief. He was sentenced to a total of 41 years of Level V incarceration. McMillion's convictions were affirmed by this Court on direct appeal.² McMillion filed 2 previous postconviction motions, the first in 1997 and the second in 2004. In each case, the Superior Court's denial of the motion was affirmed by this Court.³

(3) In this appeal from the Superior Court's denial of his third postconviction motion, McMillion claims that a) the Superior Court abused its discretion when it denied his request for DNA testing of a hair found on the victim, which, he claims, would prove that the victim misidentified him as the perpetrator; and b) his counsel provided ineffective assistance by not insisting upon DNA testing of the hair.

(4) When considering a postconviction motion pursuant to Rule 61, the Superior Court must apply the procedural requirements before

¹ Supr. Ct. R. 25(a).

² *McMillion v. State*, Del. Supr., No. 378, 1994, Veasey, C.J. (May 19, 1995).

³ *McMillion v. State*, Del. Supr., No. 490, 1997, Walsh, J. (Feb. 6, 1998); *McMillion v. State*, Del. Supr., No. 220, 2004, Steele, C.J. (Dec. 6, 2004).

considering the substantive merits of the claims asserted.⁴ In this case, the Superior Court properly concluded that McMillion's claim regarding DNA testing is barred as untimely,⁵ repetitive,⁶ and formerly adjudicated.⁷ McMillion may overcome the time and procedural bars only if he can demonstrate that the interest of justice so requires⁸ or that there is a colorable claim of a constitutional violation.⁹

(5) The record reflects that the 80-year old victim had known McMillion for virtually his entire life and was able to identify him by his voice even though McMillion had covered her eyes before attacking her. The record further reflects that the jury was aware of the hair McMillion seeks to have tested and that it did not belong to McMillion. As such, DNA testing of the hair at this point would be useless to McMillion as a means of overturning his convictions. There is, therefore, no basis for considering the merits of McMillion's first claim either in the interest of justice or due to a colorable claim of a constitutional violation.

(6) In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell

⁴ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁵ Super. Ct. Crim. R. 61(i)(1).

⁶ Super. Ct. Crim. R. 61(i)(2).

⁷ Super. Ct. Crim. R. 61(i)(4).

⁸ Super. Ct. Crim. R. 61(i)(2) and (4).

⁹ Super. Ct. Crim. R. 61(i)(5).

below an objective standard of reasonableness and that, but for his counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different.¹⁰ Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that counsel's representation was professionally reasonable.¹¹ McMillion has presented no support for his claim that, even had DNA testing of the hair been done, the outcome of his trial would have been different. There was more than sufficient evidence supporting his convictions. McMillion's ineffectiveness claim is, therefore, without merit.

(7) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹⁰ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¹¹ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).